No. 91-615

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In The

Supreme Court of the United States

October Term, 1991

ALLIED-SIGNAL, INC., as successor-in-interest to The Bendix Corporation,

Petitioner,

v.

DIRECTOR, DIVISION OF TAXATION,

Respondent.

On Writ Of Certiorari To The Supreme Court Of New Jersey

BRIEF OF ALABAMA, ARIZONA, ARKANSAS, COLORADO, DISTRICT OF COLUMBIA, FLORIDA, GEORGIA, GUAM, HAWAII, INDIANA, KENTUCKY, LOUISIANA, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH DAKOTA, TEXAS, UTAH, VIRGIN ISLANDS, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTRODUCTORY STATEMENT

Pursuant to United States Supreme Court Rule 37, the signatory States, the District of Columbia, the Virgin Islands and Guam submit this brief as *amici curiae* supporting Respondent in response to the Court's March 11, 1992 order inviting the views of *amici curiae* on the following issues:

1) Should the court overrule *ASARCO v. Idaho State Tax Commission*, 458 U.S. 307 (1982) and *F. W. Woolworth Company v. Taxation and Revenue Department*, 458 U.S. 354 (1982)?

2) If *ASARCO* and *Woolworth* were overruled, should this decision apply retroactively?

3) If *ASARCO* and *Woolworth* were overruled, what constitutional principles should govern state taxation of corporations doing business in several states?

Because of its complexity and nationwide importance, this brief addresses only the second issue.

INTEREST OF *AMICI CURIAE*

The States, as sovereigns that must function effectively in our federal system, have a vital interest in the rules governing the retroactivity of United States Supreme Court decisions affecting state taxation. To a greater extent than even individuals and businesses, states must forecast and budget limited revenues in advance.

This case, like several other cases currently before the Court,[1] is yet another example of how a single United States Supreme Court decision can profoundly affect States, individuals and businesses throughout the country. *Amici curiae*, therefore, have a direct and abiding interest in this case.

SUMMARY OF ARGUMENT

Because the States, as sovereigns, are responsible for delivering services to all their citizens, United States Supreme Court decisions affecting state taxation have a unique potential to affect directly virtually every individual and business in the nation, whether as a taxpayer or as a recipient of state services. This potential impact mandates retention of the equitable analysis articulated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) (*"Chevron Oil"*) to determine the retroactivity of Supreme Court decisions affecting state taxation. The equitable analysis articulated in *Chevron Oil* is the only test that is fair to States and taxpayers alike.

Just as the Court has a unique responsibility to "fess up and change" its opinion when it discovers an erroneous limitation on legitimate state taxation,[2] the Court

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[1] The question of retroactivity also has been explicitly raised by the Court in the following cases: *Quill Corp. v. North Dakota*, No. 91-194 (argued Jan. 22, 1992); *Barker v. Kansas*, No. 91-611 (argued March 3, 1992). *See also* note 3 *infra*.

[2] *See* Transcript of Oral Argument in *Quill Corp. v. North Dakota*, No. 91-194 at p. 19 (Jan. 22, 1992) (comment from Court).

also has a unique responsibility to mitigate the impact of opinions that change the rules upon which States and taxpayers have relied in planning their budgets and making commitments. Neither States nor taxpayers should be penalized for "fail[ing] to predict how the Supreme Court would rule." *Swanson v. Powers*, 937 F.2d 965, 971 (4th Cir. 1991), *cert. denied*, 60 U.S.L.W. 3478 (U.S. Jan. 13, 1992) (declining to impose civil liability on state tax official for enforcing presumptively valid state law taxing federal civil retirement pensions prior to *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989)).

As recently as 1982, the Court stated unequivocally that "all questions of civil retroactivity continue to be governed by the standard enunciated in *Chevron Oil Co. v. Huson*." *United States v. Johnson*, 457 U.S. 537, 563 (1982). In 1990, a plurality of the Court confirmed this standard. *American Trucking Ass'ns v. Smith*, 110 S. Ct. 2323 (1990). The 1991 decision in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), did not overrule *Chevron Oil*. The net result of the splintered voting in *Beam* is that only Justices Blackmun, Marshall and Scalia reject the application of a *Chevron Oil* analysis in a case such as the one now before the Court.

The three-part *Chevron Oil* test allows the Court the flexibility needed to perform the vital task of interpreting the federal statutory and constitutional limitations affecting state taxation. Pursuant to *Chevron Oil*, the retroactivity of a Supreme Court decision depends on whether (1) "the decision . . . establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first

impression whose resolution was not clearly foreshadowed"; (2) "retrospective operation will further or retard" the operation of the rule in question; and (3) retroactive application would result in inequity, injustice or hardship. *Chevron Oil*, 404 U.S. at 106-07 (citations omitted).

By requiring consideration of the existing legal landscape, the impact of retroactivity and the equities, the three-part *Chevron Oil* test facilitates the smooth transitions in the law that are so essential when the Court modifies or announces new constitutional or statutory interpretations affecting state taxation. Otherwise, the draconian prospect of full retroactive liability – whether for refunds or additional taxes – may impede the development of sound precedent. Only by deliberately and explicitly considering the equitable *Chevron Oil* factors can the Court develop sound precedent in a way that treats fairly all the vital interests affected.

ARGUMENT

THE COURT SHOULD REAFFIRM *CHEVRON OIL* AS THE TEST FOR DETERMINING THE RETROACTIVITY OF UNITED STATES SUPREME COURT DECISIONS RESOLVING CHALLENGES TO STATE TAX STATUTES ON FEDERAL GROUNDS.

The result in a case challenging a state tax statute on federal grounds radiates far beyond the parties before the Court. The potential effect is evidenced by the amount of litigation generated by a single United States Supreme Court decision invalidating a tax on federal constitutional

grounds.[3] The vast reach of such decisions creates a situation in which the revenues of a State are in constant jeopardy, thus potentially affecting every citizen who contributes to or benefits from the revenues. Justice O'Connor, writing for the three dissenting Justices in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), recognized this impact on the citizens of a State:

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[3] The decision of the Court three years ago in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), generated additional litigation involving as much as $2.2 billion in refund claims in at least the following twenty-four States: Alabama, Arizona, Arkansas, Colorado, Georgia, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, New Mexico, New York, North Carolina, Oklahoma, Oregon, South Carolina, Utah, Virginia, West Virginia and Wisconsin. *See* W. Hellerstein, *Preliminary Reflections on McKesson and American Trucking Associations*, 48 Tax Notes No. 3, 325, 326 (July 16, 1990). Much of this litigation has yet to be resolved in the state courts, and seven cases that originated in state courts are presently pending in this Court. *Pledger v. Bosnick*, 306 Ark. 45, 811 S.W.2d 286 (1991), *petition for cert. filed*, 60 U.S.L.W. 3173 (U.S. Sept. 3, 1991) (No. 91-375); *Kuhn v. Colorado*, 817 P.2d 101 (Colo. 1991), *petition for cert. filed*, 60 U.S.L.W. 3481 (U.S. Dec. 13, 1991) (No. 91-980); *Barker v. Kansas*, 249 Kan. 186, 815 P.2d 46 (1991), *cert. granted*, 60 U.S.L.W. 3402 (U.S. Dec. 2, 1991) (No. 91-611); *Sheehy v. Montana*, 820 P. 2d 1257 (1991), *petition for cert. filed*, 60 U.S.L.W. 3675 (U.S. March 9, 1992) (No. 91-1473); *Swanson v. North Carolina*, 330 N.C. 390, 410 S.E.2d 490 (1991), *petition for cert. filed*, 60 U.S.L.W. 3655 (U.S. March 4, 1992) (No. 91-1436); *Harper v. Virginia Dep't of Tax'n*, 242 Va. 322, 410 S.E.2d 629 (1991), *petition for cert. filed*, 60 U.S.L.W. 3406 (U.S. Nov. 15, 1991) (No. 91-794); *Lewy v. Virginia Dep't of Tax'n*, 242 Va. 322, 410 S.E.2d 629 (1991), *petition for cert. filed*, 60 U.S.L.W. 3446 (U.S. Nov. 27, 1991) (No. 91-882).

> Georgia collected in good faith what was at the time a constitutional tax. The Court now subjects the State to potentially devastating liability without fair warning. This burden will fall not on some corrupt state government, but ultimately on the blameless and unexpecting citizens of Georgia in the form of higher taxes and reduced benefits.

111 S. Ct. at 2456 (O'Connor, J., dissenting).

Because of the litigation generated in other States by a Supreme Court decision invalidating a single State's tax, such a decision goes further than even the dissenting Justices acknowledged in *Beam* and, in a very real sense, has the potential for affecting directly every citizen of the United States. The citizens will be affected in two quite distinct ways, through either an increase in their state taxes or a reduction in state services. And, with reductions in state services, those who will suffer the most will be those who are least able to provide fully for their own needs.

Retroactive application of a Supreme Court state tax decision may affect citizens in yet another way. The retroactive application of a decision *validating* a state tax has the potential for imposing a back-tax liability on numerous "unexpecting" taxpayers.

A critical need exists for this Court to establish a clear and fair standard for determining when Supreme Court decisions validating or invalidating a state tax statute will have retroactive effect. It is the position of *amici curiae* that, regardless of the retroactivity standard in other types of litigation, in cases challenging a state tax

on federal grounds, the Court should recognize the massive impact of its decisions and should apply the test announced in *Chevron Oil*. The *Chevron Oil* test, by recognizing the legitimate reliance interests of all parties, provides an equitable solution to the problems created by unanticipated changes to the constitutional landscape.[4]

A. Supreme Court Retroactivity Precedent in Review of State Tax Cases

In the past two years, the Court has decided three cases concerning the question of the retroactivity of Supreme Court decisions invalidating a state tax: *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991) (*"Beam"*); *McKesson Corp. v. Div'n of Alcoholic Beverages and Tobacco*, 110 S. Ct. 2238 (1990) (*"McKesson"*); and

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[4] The references in this brief to changes in Supreme Court precedent interpreting the federal Constitution apply equally to Supreme Court precedent interpreting the language and intent of federal statutes that have the broad reach of a federal constitutional decision. *See, e.g., Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983) (State's payment of retirement benefits constituted "discrimination" under Title VII of Civil Rights Act of 1964 but holding not to be applied retroactively). In both federal statutory and constitutional cases, the question is one of federal law within the jurisdiction of the Supreme Court. 28 U.S.C. § 1257. Federal statutes often are enacted to provide statutory guidance on basic constitutional principles, and the Court's interpretation of statutory terms, such as "discrimination," derives from and incorporates these constitutional principles. *See Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 813 (1989) (principle of nondiscrimination in 4 U.S.C. § 111 derives from constitutional doctrine of intergovernmental tax immunity).

American Trucking Ass'ns v. Smith, 110 S. Ct. 2323 (1990) ("*ATA v. Smith*").

Of the three decisions, only *McKesson* received the support of a majority of the Court. The rule announced in *McKesson* is straightforward. *McKesson* establishes that, absent a pre-deprivation remedy available to the taxpayer, prospective-only application of a Supreme Court decision is not adequate where, on the facts, it is entirely foreseeable at the time of enactment of a state tax statute that the tax in question will, when challenged, be found unconstitutional. 110 S. Ct. at 2251, 2255. *McKesson* concerns the due process remedial obligations imposed on state governments in cases where the State could not have relied in good faith on the validity of its statutory enactment. Such a case is of only marginal relevance to the retroactivity issue now before the Court. Here, by contrast, the issue is closer to the questions presented in *ATA v. Smith* and in *Beam*.

In *ATA v. Smith*, the Court divided four to four on the proper test to apply in determining retroactivity. Four Justices supported the *Chevron Oil* test, 110 S. Ct. at 2327-43; four dissenting Justices would apply the same substantive rule to all cases pending on review at the time of the decision announcing the new rule, 110 S. Ct. at 2345-56; and one concurring Justice would hold all Supreme Court constitutional decisions retroactive unless he disagreed with the particular new rule of law being announced, 110 S. Ct. at 2343-45.

Since *ATA v. Smith*, when state courts have been required to determine the retroactivity of a Supreme Court decision, most have followed the plurality in *ATA*

v. Smith and applied the *Chevron Oil* test. *See, e.g., Harper v. Virginia Dep't of Tax'n*, 241 Va. 232, 401 S.E.2d 868 (1991); *Bass v. South Carolina*, 302 S.C. 250, 395 S.E.2d 171 (S.C. 1991); *Cambridge State Bank v. Roemer*, 457 N.W.2d 716 (Minn. 1990).[5] The issue was presented to the Court again the following term in *Beam*, and state courts awaited clearer guidance.

Five opinions were written in *Beam*, none of which commanded a majority of the Court. The three dissenting Justices in *Beam* are solidly behind the application of *Chevron Oil* to controversies involving the retroactivity of cases of the sort now before this Court. As Justice O'Connor stated:

> If the Court decides, in the context of a civil case or controversy, to change the law, it must make the subsequent determination whether the new law or the old is to apply to conduct occurring before the law-changing decision. *Chevron Oil* describes our long-established procedure for making this inquiry.

111 S. Ct. at 2451.

In sharp contrast to the view expressed by Justice O'Connor in *Beam* is the view expressed by Justice Blackmun, in which Justices Marshall and Scalia joined. The position of these three Justices is that the Supreme Court lacks the authority to apply its constitutional decisions other than retroactively, regardless of whether the decision is founded on established precedent or on a new rule

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[5] These three cases were reviewed by Supreme Court. After the decision in *Beam*, the Court vacated and remanded the cases to the state supreme courts for further consideration in light of *Beam*. 59 U.S.L.W. 3864 (U.S. June 24, 1991).

of law. *Beam*, 111 S. Ct. at 2450 (Court fulfills its "judicial responsibility by requiring retroactive application of each new rule we announce") (Blackmun, J., concurring).[6] Under this view, if a State imposes a tax in reliance on existing precedent and the Supreme Court overrules that precedent, the new rule nevertheless applies retroactively, implying that the State was unjustified in relying on existing precedent. It follows then, ironically, that if a State imposes a new tax that violates clear existing precedent and the Supreme Court overrules that precedent, the new rule applies retroactively, implying that the State was justified in imposing a tax in violation of then-existing Supreme Court precedent.

Beam sent another unsettling message to States and to taxpayers. Justice Souter, in his opinion in which Justice Stevens joined, stated that the language remanding *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) for consideration of refund issues not addressed by the state courts, including a pass-through defense raised by the State, could be "fairly read" as an *implicit* ruling by the Court that *Bacchus* applied retroactively.[7] 111 S. Ct. at 2445.

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[6] However, even in the criminal context, this Court has not accepted full retroactivity of all Supreme Court decisions. For example, a prisoner on a habeas petition is not afforded the retroactive benefit of a "new rule of law." *See, e.g., Teague v. Lane*, 489 U.S. 288 (1989).

[7] The pass-through defense was an element of the State's argument in *Bacchus* that any decision in favor of the appellants would apply prospectively only under *Chevron Oil* since a refund would constitute a windfall and unjust enrichment of appellants at the expense of the general public. Brief for Appellee at 19-22. A remand to consider such remedial issues could, in fact, be fairly read as the Court's *not* determining the retroactivity issue in *Bacchus*.

Justice Souter further stated that "[b]ecause the *Bacchus* opinion did not reserve the question whether its holding should be applied to the parties before it, . . . it is properly understood to have followed the normal rule of retroactive application in civil cases." 111 S. Ct. at 2445.

This presumption of retroactivity from silence, even where the issue is never raised, briefed or argued in the Supreme Court, has created additional problems for both States and taxpayers. The actual litigants in a state tax case may have no interest in whether the ruling is prospective or retroactive and may present no argument to the Court on the issue. However, other States and other taxpayers who may be affected by the ruling must now find a way to present their views to the Court or risk being encompassed within the ruling without an opportunity to be heard.

Since the decision in *Beam*, state courts have continued to struggle with the question of the retroactivity of Supreme Court decisions in state tax cases.[8] *Amici curiae*

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[8] Prior to *ATA v. Smith* and *Beam*, many state courts applied the equitable principles enunciated in *Chevron Oil* and in *Lemon v. Kurtzman*, 411 U.S. 192 (1973), in determining the retroactivity of both state and United States Supreme Court decisions. State courts have found the *Chevron Oil* test a workable solution to the retroactivity problem. The courts have applied *Chevron Oil* in a reasonable and responsible manner which, depending on the particular facts and circumstances, may result in a holding in favor of the state or in favor of the taxpayer. *See, e.g., American Trucking Ass'ns v. Conway*, 152 Vt. 383, 566 A.2d 1335 (1989) (Supreme Court decision retroactive in this case under *Chevron Oil* because predicted by state case); *Opinion of Justices*, 131 N.H. 644, 557 A.2d 1364 (1989) (state court decision not retroactive because it upset tax practice relied on by taxpayers and State); *National Can Corp. v. Dep't of*

(Continued on following page)

submit that, as discussed below, the retroactivity standard established in *Chevron Oil* is the only viable standard which gives recognition to *stare decisis* yet considers the interests of both States and taxpayers, balances those interests and affords an equitable resolution. *Amici curiae* urge this Court to affirm that, regardless of the retroactivity standard in other types of cases, the *Chevron Oil* test is the proper test for determining the retroactivity of Supreme Court decisions that validate or invalidate a state tax on federal grounds.

B. Application of *Chevron Oil* to State Tax Cases

In most instances, the Supreme Court will determine the validity of a state tax challenged on constitutional grounds on the basis of established Supreme Court precedent. The new decision may build on or add to the body of existing law but not chart a new direction for the

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Revenue, 109 Wash. 2d 878, 749 P.2d 1286, *cert. denied*, 486 U.S. 1040 (1988) (Supreme Court decision that invalidated tax repeatedly upheld by state court not retroactive; state justified in relying on earlier decisions); *First of McAlester Corp. v. Oklahoma Tax Comm'n*, 709 P.2d 1026 (Okla. 1985) (Supreme Court decision invalidating tax on interest income not retroactive because of lack of foreseeability); *Exxon Corp. v. Hunt*, 109 N.J. 110, 534 A.2d 1 (1987) (Supreme Court decision retroactive because holding not unpredictable); *Salorio v. Glaser*, 93 N.J. 447, 461 A.2d 1100, *cert. denied*, 464 U.S. 993 (1983) (decision not retroactive based on justifiable reliance on long-standing unchallenged statute). *See also Fountain v. Fountain*, 214 Va. 347, 200 S.E.2d 513 (1973), *cert. denied*, 416 U.S. 939 (1974) (decision abolishing interspousal immunity not retroactive because persons justifiably relied on existing state of law).

Court. These decisions will always be retroactive. But constitutional doctrines are not immutable. Particularly in the tax area, changing economic realities necessitate changes in constitutional interpretations. Accordingly, the Court may be called on to reconsider an issue in light of an altered economic background. The result may be a holding that the tax is constitutional or unconstitutional, a holding that in turn overrules an existing Supreme Court precedent directing the opposite result. The Court also may be presented with a new question that reference to the existing body of constitutional precedent does not answer. The result will be a holding that the challenged tax is constitutional or unconstitutional as an issue of first impression.

While any of the above resolutions of a case may generate additional litigation in other States, this result is especially likely if the decision is premised either on a prior overruling decision or on an issue of first impression. The change in the constitutional order serves as an incentive for numerous additional parties to institute challenges to similar tax statutes in other States.

The question now before this Court is how can the Court fairly accommodate the varying circumstances and the interests of all parties affected by its decisions. *Chevron Oil* provides this flexible and equitable standard in each of the permutations described below.

(1) State Tax Upheld or Invalidated Based on Established Supreme Court Precedent

When a challenged tax is ruled constitutional based on established Supreme Court precedent, logic and

fairness support full retroactive application of the decision. A State should be able to collect and rely on revenues generated by a tax that conforms to existing Supreme Court precedent. Indeed, States can plan and operate effectively only by assuming that such taxes are valid. A *Chevron Oil* analysis fully comports with the retroactive application of Supreme Court decisions validating a state tax on the basis of existing precedent.

Likewise, a *Chevron Oil* analysis produces a fair result when a state tax statute is held unconstitutional based on existing Supreme Court precedent. A State cannot justifiably rely on revenues generated by a statute that clearly conflicts with established Supreme Court precedent. The ease of application of *Chevron Oil* under such facts is evident in the recent per curiam decision in *Ashland Oil, Inc. v. Caryl*, 110 S. Ct. 3202 (1990) ("*Ashland Oil*").

In *Ashland Oil*, the taxpayer challenged the same state tax challenged by another taxpayer in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984). The Court decided *Armco* while *Ashland Oil* was pending in state court. In a decision that pre-dated *ATA v. Smith*, the state supreme court held that the State could collect the taxes from Ashland Oil for the years preceding *Armco* because *Armco* was not retroactive. *Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W. Va. 1986).

In a per curiam opinion, this Court reversed. The Court held that, under either the dissent or the plurality in *ATA v. Smith*, *Armco* was retroactive. Under the dissent, *Armco* was retroactive because "constitutional decisions apply retroactively to all cases on direct review." 110 S. Ct. at 3204 (citing *ATA v. Smith*, 110 S. Ct. at 2349) (Stevens, J., dissenting). Under the plurality in *ATA v. Smith*, *Armco* applied retroactively because it "fail[ed] to satisfy the first prong of the plurality's test for determining retroactivity" under *Chevron Oil*. 110 S. Ct. at 3204. While *Armco* contributed to the Court's Commerce Clause jurisprudence, it did not overturn established precedent or decide an issue of first impression. *Id.* at 3205.

If all decisions of the Supreme Court fit neatly within the established precedent category, it would no doubt make little difference whether retroactivity were based on *Chevron Oil* or on a broad principle that all Supreme Court decisions apply retroactively. But this is not the case. The *Chevron Oil* test recognizes that the Supreme Court also overrules precedent and decides new issues in the absence of precedent that would preordain a specific result.

(2) State Tax Upheld or Invalidated by Overruling Prior Decisions

The view that all decisions of the Supreme Court are retroactive produces a harsh and unjust result when a tax is declared constitutional or unconstitutional because clear Supreme Court precedent is overruled. In the latter case, the message is that a State cannot presume that its statutes, implemented in good faith reliance on clear existing Supreme Court precedent, are constitutional. Thus, a State cannot plan, budget or spend in reliance on collected or anticipated revenues. Likewise, in the former case, taxpayers cannot rely on having satisfied their tax liability based on existing Supreme Court precedent. The inequity in either of these results is obvious.

Certainly taxpayers are justified in challenging state taxes by arguing that the precedent validating the tax should be overruled. But the interests of States and taxpayers in finality and predictability cannot be ignored. Future relief is incentive enough for the parties when the Court overrules a prior decision on which the parties might reasonably have relied. In the appropriate case, *Chevron Oil* permits future relief only.

The first prong of *Chevron Oil* directs the Court to determine whether the decision establishes a new principle of law "by overruling *clear* past precedent on which litigants may have *relied*." *Chevron Oil*, 404 U.S. at 106 (emphasis added). By incorporating "clear" past precedent and "reliance" into the test, *Chevron Oil* avoids a rigid result which would require prospectivity whenever the Court overrules a prior decision. Rather, *Chevron Oil* allows the Court to view the constitutional issue in its full historical perspective, considering whether the overruled decision may have been narrowed or questioned over the years to the extent that it contains little validity. In the instant case, as argued by New Jersey, *ASARCO* and *Woolworth* did not represent clear past precedent on which the taxpayer could have relied. First, the taxable transaction at issue predated *ASARCO* and *Woolworth*. Second, state courts had interpreted those decisions in various, and often conflicting, ways and later Supreme Court decisions called into question the principle *ASARCO* and *Woolworth* apparently represented. *See Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983). It is precisely in circumstances such as those presented here that the *Chevron Oil* test can accommodate both an overruling decision and a holding of retroactivity.

For a party to obtain prospective-only application of the new rule of law under *Chevron Oil*, he must have been *justified* in relying on the old rule and the new rule must overrule "clear" past precedent. Thus, an "overruling" decision need not in all instances create a new rule of law; reliance on the old rule may not have been justified.[9]

The equity in the application of *Chevron Oil* when the Court overrules a clear prior decision that would have validated the tax is apparent. States may impose taxes and plan expenditures in reliance on unimpaired Supreme Court precedent without fear that an overruling decision of the Court will suddenly and without warning remove these revenues from state treasuries and affect the States' ability to continue to provide critical governmental services. Before *Beam*, most States assumed that such was the law. The full impact on States of not being able to operate in this manner cannot be overstated.

But the reverse can happen, too. If the Supreme Court overrules a precedent under which a state tax statute would have been unconstitutional, it is the taxpayer whose reliance interest will be unsettled by a fully retroactive application of the decision. If the decision of

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[9] Even should the Court determine that *ASARCO* and *Woolworth* represented clear past precedent on which the appellant may have relied, application of the remaining two prongs of *Chevron Oil* could nevertheless result in a holding of retroactivity in this case. The harm to New Jersey and its citizens by prospective-only application of the new rule is a crucial factor in this case. And the financial impact on other States is not known.

the Supreme Court under such circumstances is retroactive, a State could impose a back-tax liability on taxpayers. Included within the class affected are not only the litigants in the case, but also taxpayers within the State and taxpayers in other States. In some instances, retroactive taxation may be a fair result; in other instances, it clearly will not be. The application of *Chevron Oil* provides the flexibility needed for courts, on a case-by-case basis, to reach an equitable result and to avoid the prejudice arising from decisions that could not fairly have been anticipated.

It may be, of course, that taxpayers in this situation would be protected by other constitutional doctrines that would limit the ability of the State retroactively to assess taxes based on events that occurred in prior years. Importantly, however, the potential application of such doctrines reinforces the point sought to be made. What is sauce for the goose should be sauce for the gander. If constitutional doctrines are in place that would protect individual taxpayers in such a case, the principle on which these doctrines are based is precisely the principle suggested here: it is unfair to upset settled expectations by revisiting financial arrangements thought to be over and done with.

(3) State Tax Upheld or Invalidated by Resolution of Issues of First Impression

As discussed above, *Chevron Oil* accommodates a situation in which the Court, by overruling clear past precedent, effects a dramatic change in the constitutional order by replacing existing law with a new rule of law.

Chevron Oil also accommodates a situation in which a new rule of law first emerges on the constitutional scene. By allowing the Court to apply such a decision prospectively only, *Chevron Oil* resolves the dilemma in a way that is fair both to States and to taxpayers.

A case of first impression invalidating a state tax on federal constitutional grounds has a potentially disastrous effect on other States with similar statutes.[10] If Supreme Court precedent exists on the issue raised, a State may analyze and interpret the precedent to reach a reasonable conclusion on the constitutionality of its statute. If the precedent may arguably support either a holding of constitutionality or unconstitutionality, the State has some forewarning that its revenues may be at risk.

The resolution of an issue of first impression provides no forewarning. And, as in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989) ("*Davis*") and the cases spawned by *Davis*, the challenge may be to numerous state statutes that have been on the books and unchallenged for many years. Such decisions come as a bolt from the blue to the States. Absent a retroactivity standard that takes into account the reliance interests of States in the validity of longstanding and unchallenged tax statutes, nothing less than an express ruling of constitutionality by this Court will protect the revenues and permit the States to plan and budget for the present and the future. Certainly States are not required to present

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[10] *See* note 3 *supra*, regarding the effect that the ruling on Michigan's tax statute in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), had on other States.

their tax statutes to the Supreme Court for review and approval in order to obtain fiscal stability.[11]

Limiting the effect of a new rule of law in a case of first impression to prospective application only is not unfair to taxpayers. Reliance is the critical factor in the doctrine of retroactivity. A taxpayer cannot argue that he relied on the unconstitutionality of a tax when there is no Supreme Court precedent foreshadowing that result. If the taxpayer succeeds in his challenge and the Court adopts a new legal rule, the taxpayer will receive the future benefit of the new rule. Equity requires no more.[12]

The nature of the harm suffered by the taxpayer is an appropriate factor in determining where the equities lie in a case of unforeseen constitutional developments in state tax litigation. The taxpayers are not harmed because the State denied them a personal constitutional right,

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[11] Indeed, unlike provisions in some state constitutions, the federal Constitution would preclude a State's seeking such review before enacting the tax as constituting a request for an advisory opinion. *Compare* U.S. Const. Art. III, § 2 (judicial power extends to cases and controversies) *with* Fla. Const. Art. V, § 3(10) (1980) (Attorney General of Florida may request advisory opinion of state supreme court on Florida constitutional questions).

[12] When the Supreme Court invalidates a state tax statute, prospective application alone has a significant impact on the states affected by the change in the law. States must analyze their tax systems to determine whether they comply with the new rule and may need to amend their statutes. Such amendments often entail the expense of calling a special session of the State's legislature, and the necessary amendments for future compliance often result in a loss of anticipated and already budgeted revenues.

such as freedom from an unreasonable search and seizure or freedom from cruel and unusual punishment. They are "harmed" because a State innocently failed to anticipate a dramatic shift in the Court's interpretation of federal statutory and constitutional principles regarding the State's ability to impose a legitimate state tax on its citizens. Balancing this alleged harm against the very real harm that retroactive application may impose on the remainder of the tax-paying community and on those citizens who benefit from services provided from previously imposed taxes, prospective relief is a fully adequate remedy.

When a taxpayer challenges a state tax statute, he is in effect asserting a challenge on behalf of every similarly situated taxpayer in the nation. His challenge if successful subjects the revenues of all of the States to risk; his challenge if unsuccessful subjects the income of all similarly situated taxpayers to additional tax liability. It is this effect that *amici curiae* urge this Court to avoid by reaffirming its adherence to the *Chevron Oil* standard for determining when Supreme Court decisions validating or invalidating state taxes will apply retroactively. The Court should not be in a position in which it is reluctant to overrule prior precedent or to decide issues of first impression because the retroactive application of such decisions imposes a liability on unsuspecting, and often unrepresented, parties. *Chevron Oil* allows the Court to depart from rigid adherence to past precedent without imposing disruptive and potentially devastating future harm.

The three-part *Chevron Oil* test allows the Court to consider the existing legal landscape, the impact of retroactivity, and the equities before announcing dramatic changes in the federal constitutional and statutory principles governing state taxation of individuals and businesses. The test facilitates a smooth transition from the old rule to the new rule in a manner that is fair to States and taxpayers alike. This is particularly true in a *Davis*-like situation, in which the federal law at issue does not deal with the issue of remedy – prospective or retroactive – at all.

CONCLUSION

For the reasons stated, the Court should reaffirm *Chevron Oil* as the test for determining the retroactivity of United States Supreme Court decisions resolving challenges to state tax statutes on federal grounds.

Respectfully submitted,

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